

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 G 093

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

AMANDA RANDALL,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on December 11, 1998 at 1525 Sherman Street, B-65, Denver, Colorado. Respondent was represented by First Assistant Attorney General Wade Livingston. Complainant appeared *pro se*.

MATTER APPEALED

Complainant seeks a determination that Respondent failed to comply with the terms of a settlement agreement entered into in State Personnel Board Case No. 98 B 071 and requests a refund of income improperly withheld pursuant to the settlement agreement plus interest. For the reasons set forth below, Respondent's actions are reversed.

PROCEDURAL HISTORY

On December 18, 1997 Complainant appealed a disciplinary action from the Department of Human Services to the State Personnel Board (Board), Case No. 98 B 071. The case was set for hearing on February 2, 1998 but did not proceed to hearing. Rather, on March 5 and 6, 1998, the parties executed a Release and Settlement Agreement on the case (Complainant's Exhibit G). On April 2, 1998 Complainant filed a Petition for Hearing pursuant to Board Rule 10-8-1(B)(6), i.e. Respondent's failure to comply with the terms of a settlement agreement.

The Board conducted a Preliminary Review of the issues in this case and determined that valid issues existed which merited a full evidentiary hearing. This case was set for hearing on October 2, 1998. The hearing was timely commenced and proceeded to the presentation of Complainant's case. Complainant's evidence consisted of various documents and her own testimony. Complainant was properly sworn in and during her testimony a potential conflict of interest involving the Assistant Attorney General arose, i.e. Complainant alleged that Respondent's Counsel had participated in the settlement negotiations and agreement, provided specific information upon which Complainant relied and had specific notice of certain material facts. A recess was granted for Respondents Counsel, the Assistant Attorney General, to seek the advice of his First Assistant Attorney General (supervisor). Upon Respondent's Counsel's return,

he moved for a continuance in order to withdraw as Respondent's Counsel and have another Assistant Attorney General handle the case thereby avoiding any potential conflict of interest. The case was reset for December 11, 1998.

1. Witnesses / Testimony

At the December 11, 1998 hearing in this matter, the parties stipulated to certain facts which obviated the need for Complainant to testify. Complainant chose to call no witnesses, rely on stipulated documentary evidence and argue her case by means of an opening/closing statement only. Therefore, Respondents Counsel moved that Complainant's earlier testimony, on October 2, 1998 be stricken, i.e. not available to the administrative law judge (ALJ) for use in making her decision. Counsel's motion was granted in part and denied in part, i.e., Complainant's testimony of October 2, 1998 was considered by the administrative law judge only for procedural purposes, i.e. to determine if there was a potential conflict of interest and, therefore, the need to continue to hearing. Further, the ALJ stated that she would not consider Complainant's October 2, 1998 testimony in deciding the substantive issues of this case.

Respondent also chose to call no witnesses, rely on stipulated documentary evidence and argue its' case by means of an opening/closing statement only.

2. Exhibits

Complainant's Exhibits A through G and Respondent's Exhibits 1 through 4 were admitted by stipulation of the parties.

Judicial notice is taken of the Board's own files in Case No. 98 B 071 and this case, No. 98 G 093. Judicial notice is also taken that within the Colorado State Personnel system disciplinary actions do not follow an employee who transfers to a different department, division or agency.

ISSUES

1. Whether Respondent failed to comply with the terms of the Release and Settlement Agreement executed in State Personnel Board Case No. 98 B 071.
2. Whether Respondent improperly withheld funds from Complainant's paycheck based on the Release and Settlement Agreement executed in State Personnel Board Case No. 98 B 071.
3. Whether Respondent's actions were arbitrary and capricious.
4. Whether Complainant should be reimbursed for amounts withheld from Complainant's paycheck in this matter, plus interest and costs.

STIPULATED FACTS

1. Respondent, Department of Human Services (DOHS), by and through Mr. Tom Wristen, knew, i.e. had notice, that Complainant was no longer employed by Department of Human Services at the time he, on behalf of DOHS, entered into the settlement agreement at issue in this matter.

2. Respondent, Department of Human Services (DOHS), by and through Assistant Attorney General Gary Herbert, knew, i.e. had notice, that Complainant was no longer employed by Department of Human Services at the time he, on behalf of DOHS, witnessed the settlement agreement at issue in this matter.

FINDINGS OF FACT

1. Disciplinary action was imposed on Complainant by letter dated December 8, 1997. (Respondent's Exhibit 1.)

2. The disciplinary action imposed consisted of a two step reduction in pay, effective "December 30, 1997 continuing for three months through February 1998." (Respondent's Exhibit 1.)

3. On December 18, 1997 Complainant appealed the disciplinary action to the State Personnel Board (Case No. 98 B 071).

4. Through a payroll/clerical error the two step reduction in pay "did not take place" on December 30, 1997 and Respondent determined: "Therefore the two step reduction in pay will be in effect for the months ending in January, February and March, 1998." (Respondent's Exhibit 2.)

5. A two step reduction in pay, totaling \$307.00, was withheld from Complainant's January 1998 pay. (Respondent's Exhibit 4.)

6. Hearing on Complainant's appeal of the disciplinary action was set for February 2, 1998. However, the hearing date was vacated.

7. Effective February 17, 1998 Complainant transferred "to another state agency." (Complainant's Exhibit B.)

8. A one step reduction in pay, totaling \$153.50, was withheld from Complainant's February 1998 pay. (Respondent's Exhibit 4, Complainant's Exhibits D and E.)

9. On March 5 and 6, 1998 the parties, Complainant and Department of Human Services (DOHS) entered into a settlement agreement in which DOHS agreed "to modify and seal the disciplinary action and corrective action letter dated December 8, 1997, and to reduce the penalty from a two step reduction in pay for three months to a one step reduction in pay for three months, beginning January 1, 1998, and continuing through March 31, 1998." (Complainant's Exhibit G.)

10. Each page of the settlement agreement is initialed by Gary Herbert, Assistant Attorney General and Attorney for DOHS in settlement of State Personnel Case No. 98 B 071, i.e. the settlement agreement at issue in this case.

11. On April 1, 1998 Tom Wristen, Controller, Division of Accounting issued a memo setting out Respondent's settlement calculations, Complainant's adjusted salary and actual payments withheld from Complainant's pay checks for January, February and March 1998. (Respondent's Exhibit 3.)

12. An undated document, entitled "AMANDA RANDALL INFORMATION", states: "My intent in entering into this settlement agreement was that no further financial transactions take place. Subsequently, when Amanda Randall laid claim that additional moneys were due her, I had no choice but to write the attached April 1, 1998 memo."

13. Complainant calculates that the amount due her, plus interest as of the date of hearing, was \$294.42 (Two hundred, Ninety-four dollars and Forty-two cents). (Complainant's Exhibit A.)

DISCUSSION

Pursuant to Board Rule 10-8-l(B)(6), Complainant argues that Respondent failed to comply with/properly implement the settlement agreement that is at issue in this matter and that Respondent acted arbitrarily and capriciously in withholding, from her pay checks, both a two step reduction in pay for the month of January 1998 and a one step reduction in pay for the month of February 1998. (See Respondent's Exhibit 4 and Complainant's Exhibits D and E.) Complainant further argues that Respondent should be held to the plain language of the settlement agreement. (Complainant's Exhibit G.)

Respondent argues that the intent of the settlement agreement was for Complainant to be held to an amount totaling a one step reduction in pay for three months, January, February and March 1998.

1. Practice

It is the practice, within the Colorado State Personnel system, that disciplinary actions do not follow an employee who transfers to a different department, division or agency. The practice is logically based on the fact that once an employee leaves the supervision or "chain of command" of an appointing authority, that appointing authority no longer has the authority to impose discipline on the employee. It is reasonable to assume that Tom Wristen, acting on behalf of DOHS and Gary Herbert, Assistant Attorney General representing DOHS, were aware of this practice.

2. Notice

At the time they accepted/witnessed the settlement agreement, both Mr. Wristen and Mr. Herbert, respectively on behalf of DOHS, knew, i.e. had notice that Complainant had transferred to another agency. It is reasonable to assume that if there were any concern as to whether or not the disciplinary action would follow Complainant to her new position, it would have been addressed in the language of the settlement agreement. However, the settlement agreement does not indicate a total amount to be withheld. Instead the settlement agreement specifically states that DOHS agreed 'to reduce the penalty from a two step reduction in pay for three months to a one step reduction in pay for three months, beginning January 1, 1988, and continuing through March 31, 1998.' (Complainant's Exhibit G.)

3. Plain language vs. intent

The settlement agreement did *not* state a specific total amount based on Complainant's pay rate at the time of settlement or in the event of a pay change. It does state a specific time period during which Complainant's pay would be reduced. Both Mr. Wristen, on behalf of DOHS,

and Mr. Herbert, the Assistant Attorney General advising DOHS, were aware, at the time they signed the settlement agreement, that a two step reduction had been withheld from Complainant's January 1998 pay check. they were also aware, at the time they signed the settlement agreement, that Complainant no longer worked at DOHS, i.e. that the authority to impose discipline on Complainant no longer existed. it is reasonable to assume that either or both Mr. Wristen or Mr. Herbert could have added or substituted terms and conditions within the settlement agreement to address the issue of Complainant's transfer to another agency. Even if Mr. Wristen was unaware of the practical result to the settlement agreement caused by Complainant's transfer, Mr. Herbert, the attorney advising Mr. Wristen and DOHS in this matter should have known.

It is the Attorney General's job duty to advise departments within state government, e.g. DOHS, regarding legal matters such as settlement agreements. Mr. Herbert witnessed the settlement agreement. It was his job to be specific about the terms and conditions of the agreement. He knew Complainant no longer worked for DOHS and he either knew or should have known that Mr. Wristen would not have the authority to impose discipline while Complainant worked under a different appointing authority.

Respondent argues that its intent was to collect a total amount, equaling a one step reduction pay for three months, from Complainant. Yet the total amount is not stated in the settlement agreement. Mr. Wristen's memo and "Information" (Respondent's Exhibits 3 and 4) were issued nearly a month after lie signed the settlement agreement and are after-the-fact, unilateral attempts to influence the interpretation of the language of the settlement agreement.

4. Arbitrary and capricious.

The language of the settlement agreement is clear. It is reasonable to assume that Respondent could have modified or substituted other clear language if Respondent had a different intent or goal in mind. Therefore, Respondent should be held to the plain language of the settlement agreement.

It is unreasonable and, therefore, arbitrary and capricious to attempt to unilaterally influence the interpretation of the language of the agreement after it became clear that there was no authority to continue discipline of this Complainant.

CONCLUSIONS OF LAW

1. It is unnecessary to make findings of fact or conclusions of law on the original issues in State Personnel Board Case No. 98 B 071 in order to determine whether the settlement agreement was properly implemented.
2. Respondent failed to properly implement the terms and conditions of the settlement agreement covering State Personnel Board Case No. 98 B 071.
3. Respondent's action were arbitrary and capricious.
4. Complainant is entitled to a refund of pay improperly withheld from her pay check plus interest and costs.

ORDER

Respondent is directed to refund to Complainant any amounts withheld from her pay checks for January and February 1998 that is in excess of a one step pay reduction for one and one-half months plus interest at 6% percent per annum from the date of withholding and costs of appeal.

Dated this 25th
day of January 1999
at Denver, CO

Michael S. Gallegos
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et. seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the AU must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. If you have any questions or desire any further information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-IO-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline. described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of January, 1999, I placed true copies of the foregoing [INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Ms. Amanda Randall
965 Newark
Aurora, CO 80010

and to the respondent's representative in the interagency mail, addressed as follows:

Mr. Wade Livingston
First Assistant Attorney General
1525 Sherman St., 5th Floor
Denver, CO 80203
